NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FIVE POINTS HOTEL PARTNERSHIP, an Arizona partnership; and PARAGON HOTEL CORPORATION, a Delaware corporation, Plaintiffs/Appellants, v. JOE PINSONNEAULT, individually and on behalf of the marital community of Joe Pinsonneault and Jane Doe Pinsonneault; and FIRST ARIZONA TITLE AGENCY, LLC, f/k/a TSA TITLE AGENCY, an Arizona corporation, Defendants/Appellees.	2 CA-CV 2010-0118 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200501706

Honorable Robert Carter Olson, Judge

AFFIRMED

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E C K E R S T R O M, Judge.

¶1 Plaintiffs/appellants Five Points Hotel Partnership and its majority shareholder Paragon Hotel Corporation (collectively "Five Points") appeal from the final judgment in a case arising from its sale of a hotel to Casa Grande Resort Living, LLC (CGRL) in 2005.[1] In this appeal, Five Points argues the trial court erred when it granted summary judgment in favor of defendants/appellees First Arizona Title Agency (FATA) and Joe Pinsonneault, the managing member of CGRL.[2] For the following reasons, we affirm the judgment.

Factual and Procedural Background

¶2 On an appeal from summary judgment, we view the facts in the light most favorable to the party opposing summary judgment. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc*., 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). In March 2005, Five Points and CGRL agreed that CGRL would purchase the hotel for $3.8 million. CGRL had plans to immediately resell it. According to the purchase agreement, CGRL was to

[1]CGRL is not a party to any of the appeals.

[2]After this court consolidated the three separate appeals in this case, Five Points and FATA jointly moved the court to bifurcate their appeal from those involving the other defendants. This court granted the motion and allowed Five Points to submit separate briefs for the FATA and Pinsonneault issues. However, those issues were never assigned separate case numbers and remain together in the same appeal; thus, we have discussed both in this decision.

pay nothing to Five Points at the time of initial closing but would assume the hotel's bond debt. Thereafter, according to Five Points, the bond trustee and escrow company would "reconcile the [hotel's] various bond reserve accounts and . . . specified operating accounts of the Hotel, and pay Five [Points] any remaining funds in those accounts," and CGRL would "pay to Five [Points] any difference between the total payoff amount of the bonds and the stated purchase price of the Hotel." This would all occur in a "second closing." Before entering into the purchase agreement, CGRL and Five Points executed escrow instructions with FATA that specified that FATA was to administer the second closing.[3]

¶3 CGRL resold the hotel to a third party, Peter Nagra, in June 2005 for $6.1 million, using FATA as the escrow agent. FATA distributed the sale proceeds to CGRL without conducting the second closing with Five Points. After its attempts to gain CGRL's cooperation to conduct the second closing were unsuccessful, Five Points filed this action in December 2005 against CGRL and Pinsonneault for breach of contract and requested specific performance of the second closing by FATA, CGRL, and Pinsonneault. Five Points later amended its complaint to include additional claims against CGRL and Pinsonneault for breach of the duty of good faith and fair dealing, fraud, and negligent misrepresentation, contending it was owed approximately $300,000 from the reconciliation. Five Points also dropped its claims for specific performance and instead alleged FATA had breached its fiduciary duty by failing to conduct the second closing.

[3]At the time this action was filed, FATA was known as TSA Title Agency, LLC.

¶4 FATA moved for summary judgment, arguing it had not breached a fiduciary duty because the purchase agreement was an integrated contract that superseded the escrow instructions and did not require FATA to administer the second closing. The trial court granted FATA's motion because it found the escrow instructions had been superseded and because it was undisputed that FATA neither had "authority to force the reconciliation to occur nor any ability to prevent the second sale from occurring." At the same time, CGRL and Pinsonneault moved for summary judgment on Five Points' claims against them for fraud and negligent misrepresentation. In their motion, CGRL and Pinsonneault argued, *inter alia*, that those tort claims were barred by the economic loss rule, and the trial court apparently agreed, dismissing those claims against Pinsonneault and CGRL.[4] After a bench trial, the court found in favor of Five Points on its remaining claims against CGRL and awarded $300,000 in damages and $200,000 in attorney fees and costs.[5] This appeal followed.

Discussion

FATA

¶5 Five Points argues the judgment in favor of FATA should be reversed. "We review the trial court's grant of summary judgment on the basis of the record made

[4]Although the court's final judgment is silent on the dismissal of the fraud and misrepresentation claims against CGRL, it implicitly dismissed those claims when it granted CGRL's and Pinsonneault's motion for summary judgment on that basis. In any event, Five Points does not challenge the dismissal of those claims against CGRL.

[5]Five Points had also alleged breach of fiduciary duty claims against two of its former partners for consulting fees they had obtained from the resale of the hotel. Those claims were tried by a jury and are not the subject of this appeal.

in the trial court, but we determine *de novo* whether the entry of judgment was proper." *Schwab v. Ames Constr*., 207 Ariz. 56, ¶ 17, 83 P.3d 56, 60 (App. 2004). Specifically, Five Points contends FATA breached its fiduciary duty by failing to follow the escrow instructions that required a second closing between Five Points and CGRL and by allowing the resale of the hotel from CGRL to Nagra to proceed in the absence of the second closing. After a hearing, the trial court granted judgment in favor of FATA, finding no breach of duty in part because "FATA had no authority to force the reconciliation to occur nor any ability to prevent the second sale from occurring."[6]

¶6 "The escrow relationship gives rise to two specific fiduciary duties to the principals: to comply strictly with the terms of the escrow agreement and to disclose facts that a reasonable escrow agent would perceive as evidence of fraud being committed on a party to the escrow." *Maxfield v. Martin*, 217 Ariz. 312, ¶ 12, 173 P.3d 476, 478 (App. 2007); *see also* 30A C.J.S. *Escrows* § 25 (2010) ("An escrow agent owes the other parties to an escrow agreement the fiduciary duty of a trustee, and is under a duty not to deliver the escrow to anyone except upon strict compliance with the conditions imposed by the escrow agreement."). Five Points argues FATA breached its duty to comply strictly with the escrow instructions. But Five Points has not raised an issue of material fact that FATA breached that duty. *See* Ariz. R. Civ. P. 56(c)(1) (summary judgment proper when no issue of material fact exists and movant entitled to

[6]Five Points also argues the trial court erred when it found the purchase agreement superseded the escrow instructions. We need not decide that issue because we have concluded FATA did not breach its duty as to the escrow instructions, even assuming they had not been superseded.

judgment as matter of law); *accord Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶7 The relevant provision of the escrow instructions relating to the second closing is as follows: "All adjustments between the parties for funds held by US Bank, accounts payable & receivable, operating accounts, etc. shall be furnished to Escrow Agent for a final closing involving the disbursement of funds due and owing on or before October 1, 2005." Nothing about this instruction required FATA to stop the closing between CGRL and Nagra from occurring, and Five Points has not specified the language in the instructions with which FATA did not strictly comply. Notably, this instruction requires the escrow agent to "be furnished" with the funds to settle the accounts, which was not done here. *See Great Am. Ins. Co. v. Canandaigua Nat'l Bank & Trust Co*., 804 N.Y.S.2d 177, 180 (App. Div. 2005) (defining escrow agreement as "an agreement pursuant to which funds are delivered to a third-party depositary, the grantor relinquishes control over the funds, and the funds are to be delivered to a third party conditioned upon the performance of some act or the occurrence of some event"). Five Points has not argued FATA had a duty to independently obtain the funds necessary to settle the accounts, and Arizona law does not recognize such a duty. *See Maganas v. Northroup*, 135 Ariz. 573, 576, 663 P.2d 565, 568 (1983) ("two distinct fiduciary duties" arising from escrow relationship are strict compliance and disclosure of known fraud); *U.S. Life Title Co. of Ariz. v. Bliss*, 150 Ariz. 188, 190, 722 P.2d 356, 358 (App. 1986) (duties of escrow agent strictly construed according to escrow agreement).

¶8 Five Points argues "FATA was aware of the conflict regarding the 'second closing' and should have known that it had no authorization to finalize the second sale of the Hotel from CGRL to Nagra." Five Points relies on the principle that when an ambiguity or other conflict exists between the escrow instructions and other documents in escrow or facts known to the agent, the agent has a duty to contact the principals to clarify their intent. *See Burkons v. Ticor Title Ins. Co. of Cal.*, 168 Ariz. 345, 352, 813 P.2d 710, 717 (1991). Relying on *Burkons*, Five Points contends "FATA's duties required it to clarify its instructions with Five Points before completing the sale from CGRL to Nagra." But Five Points overlooks that the relevant duty is to clarify the principals' intent and Five Points was not a principal to the CGRL/Nagra escrow. *See id.* at 352, 813 P.2d at 717; *Gardenhire v. Phoenix Title & Trust Co.*, 11 Ariz. App. 557, 559, 466 P.2d 776, 778 (1970). Other than suggesting FATA should have stopped the resale closing from occurring despite its concession FATA had no ability to do so, Five Points has not explained what FATA could have done to effectuate the second closing. The trial court did not err when it granted summary judgment in favor of FATA on Five Points' breach of fiduciary duty claim.

Pinsonneault

¶9 Five Points also argues the trial court erred when it dismissed its claims for fraud and negligent misrepresentation against Pinsonneault based on the economic loss rule.[7] Five Points relies heavily on the fact our supreme court, in a recent decision, noted it has only applied the economic loss doctrine to product liability and construction defect

[7]Five Points has not appealed the dismissal of its same claims against CGRL.

claims. *See Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc.*, 223 Ariz. 320, ¶ 1, 223 P.3d 664, 665 (2010). Indeed, the court in that case stated:

> Rather than rely on the economic loss doctrine to preclude tort claims by non-contracting parties, courts should instead focus on whether the applicable substantive law allows liability in the particular context. For example, whether a non-contracting party may recover economic losses for a defendant's negligent misrepresentation should depend on whether the elements of that tort are satisfied . . . .

Id. ¶ 39. The trial court here found the rule precluded Five Points' claims without first determining whether Five Points had satisfied the elements of fraud or negligent misrepresentation. However, we need not decide whether the court's application of the economic loss rule was ultimately improper because we have determined Five Points has not shown a genuine issue of material fact exists on its claims. "We may uphold a judgment on grounds different from those cited by the trial court." *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 502, 851 P.2d 122, 127 (App. 1992); *see also Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 584, 937 P.2d 1382, 1390 (App. 1996) (when reversing summary judgment on one ground, "we may review the other grounds raised to determine whether the summary judgment can be sustained as being correct even though granted for the wrong reason").

¶10 To prove fraud, Five Points had the burden to show by clear and convincing evidence that Pinsonneault knowingly made a false representation of material fact that he intended Five Points to act upon, that Five Points had the right to rely on the representation and actually did rely on it without knowing it was false, and that Five Points was injured as a result. *See Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498,

500, 647 P.2d 629, 631 (1982). The tort of negligent misrepresentation requires proof that a person, in the course of a transaction in which he or she has a financial interest, "'supplies false information for the guidance of others in their business transactions,'" they suffer "'pecuniary loss caused to them by their justifiable reliance upon the information,'" and the supplier of the information "'fails to exercise reasonable care or competence in obtaining or communicating the information.'" *St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 312, 742 P.2d 808, 813 (1987), *quoting* Restatement (Second) of Torts § 552 (1977).

¶11 In support of its claims for fraud and negligent misrepresentation, Five Points alleged Pinsonneault had made the following representations: 1) that CGRL wanted to structure the sale of the hotel in two parts; "first, a closing involving the sale of the Hotel to [CGRL] and an assumption of the Senior and Subordinate bonds by [CGRL], and second, a 'second closing' wherein the bond reserve accounts and certain operating accounts of the Hotel would be reconciled, with the remainder being paid to Five [Points]"; 2) that CGRL "would pay interest on both the Senior and Subordinate Bonds following the sale to [CGRL] and the assumption by [CGRL] of these liabilities"; and 3) that Five Points should pay "from [its] own accounts upon liabilities of those Hotel operating accounts enumerated in Section 2 of the Agreement of Asset Purchase, as those debts would be reconciled in the 'second closing' and Five [Points] would therefore be repaid such payments." Five Points then alleged that each of these representations was false at the time made. As to the fraud claim, Five Points alleged that "[a]t the time the

representations were made by Pinsonneault, [CGRL] and Pinsonneault had no intention of consummating the reconciliation or 'second closing' with Five [Points]."

¶12 Five Points has not explained how the first statement at issue, that "CGRL wanted the deal structured in two steps," is actually false. To show the statement is false, Five Points would have to prove that CGRL did not actually want the deal structured in two steps. But Five Points has not made this argument. Thus, the above apparently truthful statement cannot support either a claim for fraud or for negligent misrepresentation. *See Nataros v. Fine Arts Gallery of Scottsdale, Inc.*, 126 Ariz. 44, 48, 612 P.2d 500, 504 (App. 1980) (proof of falsity of representation is essential element of both fraud and negligent misrepresentation).

¶13 The second two statements, "that CGRL would pay interest on the bonds following the sale of the Hotel," and "that CGRL would compensate [Five Points] for the operating expenses they incurred following the sale," are not statements of existing fact but rather promises of what CGRL would do in the future.[8] *See Waddell v. White*, 56 Ariz. 420, 428, 108 P.2d 565, 569 (1940) ("Representations which give rise to an action of fraud must, of course, be matters of fact which exist in the present, and not merely an agreement or promise to do something in the future . . . ."). "A promise of future conduct is not a statement of fact capable of supporting a claim of negligent misrepresentation."

[8]Five Points contends the statements were of existing fact because "the representations caused the parties to structure their deal in the manner it was on March 1." But that circumstance is relevant to the element of reliance, not to whether the statements were about presently existing facts. *See Berry v. Robotka*, 9 Ariz. App. 461, 468, 453 P.2d 972, 979 (1969) (reliance in fraud context is "a belief which motivates an act").

McAlister v. Citibank (Ariz.), 171 Ariz. 207, 215, 829 P.2d 1253, 1261 (App. 1992). Accordingly, those statements cannot support Five Points' negligent misrepresentation claim against Pinsonneault.

¶14 However, "[f]raud can be based upon unfulfilled promises or expressions concerning future events . . . if statements regarding those events 'were made with the present intent not to perform.'" *Id*. at 214, 829 P.2d at 1260. But other than allusions to CGRL trying to "hide" the resale to Nagra and failing to disclose that FATA's escrow agent was married to CGRL's financial controller, Five Points fails to specify what evidence shows Pinsonneault made the statements with the intent not to conduct the second closing and reconciliation of accounts. *See Echols*, 132 Ariz. at 500, 647 P.2d at 631 ("'Fraud may never be established by doubtful, vague, speculative, or inconclusive evidence.'"), *quoting In re McDonnell's Estate*, 65 Ariz. 248, 253, 179 P.2d 238, 241 (1947). The fact that CGRL ultimately breached the contract is not enough to show Pinsonneault had the intent not to perform at the time the statement was made. *See Pinnacle Peak Developers v. TRW Inv. Corp.*, 129 Ariz. 385, 389, 631 P.2d 540, 544 (App. 1980) (nonperformance of contract standing alone insufficient to infer fraudulent intent); *accord McAlister*, 171 Ariz. at 214, 829 P.2d at 1260 (intent to not perform "must be established independent of a showing of the defendant's failure to perform").

¶15 In short, Five Points has not shown there existed a genuine issue of material fact about whether Pinsonneault's alleged misrepresentations were made with the intent not to perform them. *See Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 77, 985 P.2d 556, 562 (App. 1998) (concluding insufficient evidence of present intention not to

perform future promise precluded claim for fraud and affirming grant of summary judgment on that ground); *Fridenmaker v. Valley Nat'l Bank of Ariz.*, 23 Ariz. App. 565, 571, 534 P.2d 1064, 1070 (1975) (affirming grant of directed verdict on same ground). Accordingly, we find no error in the dismissal of Five Points' claims for fraud and negligent misrepresentation.

Disposition

¶16 Because the trial court did not err when it granted summary judgment in favor of both FATA and Pinsonneault, we affirm the judgment as to those claims.[9]

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

[9]Although Five Points specified in its notice of appeal that it was appealing from the award of attorney fees to FATA, it has made no argument in its briefs relating to that award. Thus, we do not address it. *See* Ariz. R. Civ. App. P. 13(a)(5), (6) (appellant's brief must contain statement of issues presented with supporting argument); *see Ramsey v. Yavapai Fam. Advocacy Ctr.*, 225 Ariz. 132, n.9, 235 P.3d 285, 291 n.9 (App. 2010).